STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 25-98 and DECERTIFICATION NO 2-98:

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 254, Complainant, STEVE LODHAL, Petitioner, (DC 2-98) vs. STATE OF MONTANA, DEPARTMENT OF ADMINISTRATION , CENTRAL MAIL BUREAU, Defendant.	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

* * * * * * * * * *

I. INTRODUCTION

Complainant, Laborers International Union of North America, AFL-CIO, Local No. 254, filed an unfair labor practice charge on February 6, 1998, alleging the Defendant, Department of Administration, Central Mail Bureau, was violating § 39-31-401(5) and (1), MCA, by not providing information germane to wages and classification necessary for the Union to bargain and represent its members.

On February 23, 1998, Steve Lodhal, a member of Laborers International Union of North America, AFL-CIO, Local No. 254, filed an objection to the conduct of a decertification election conducted on February 17, 1998. Lodhal charged the Defendant with failure to provide basic information relevant to bargaining. He based his election challenge on the Defendant's verifying

which members of the collective bargaining unit had voted during the representative election, the Defendant's alleged discrimination against Union supporters in pay upgrade training, and the Defendant's circumvention of the collective bargaining representative by attempting to get a pay upgrade for unit members. He contends these occurrences are sufficient basis to block the results of Decertification Election 2-98. The Union was decertified by a one vote margin in that election.

Joseph Maronick, Hearing Officer, conducted a hearing on July 20, 1998. Parties present, duly sworn and offering testimony included Union witnesses Christian MacKay, Union Business Manager; Wayne Guccione, Mail Clerk and Union Shop Steward; Dennis McAlpin, Mail Clerk and Substitute Shop Steward; and, Mark Olson, Mail Clerk. Defendant witnesses included Ward Stiles, Research Supervisor, Department of Labor and Industry; Bob Liffring, Research and Analysis Officer, Department of Labor and Industry; Kevin McRae, Labor Relations Specialist, Department of Administration; and Jennifer Jacobson, Election Judge, Employment Relations Division, Department of Labor and Industry. Ward Stiles and Bob Liffring were represented by counsel for the Department of Labor and Industry, Kevin Braun. Reid L. Gardiner, Bureau Chief, Central Mail, was present throughout the hearing. Steve Lodhal, the Mail Clerk who filed the decertification petition, was present throughout the hearing. Counsel Karl Englund represented the Union and Counsel Vivian Hammill represented the Defendant. Exhibits 1 through 11 were admitted into the record without objection. Administrative notice without objection was taken of the charges filed, charge response, the

investigation report and determination, motion and motion response, motion ruling, and all process and service documents. The parties concurrently submitted post-hearing memorandum of argument on September 11, 1998.

II. FINDINGS OF FACT

1. The Union and the Defendant engaged in contract negotiations beginning in March 1997. The Union sought to move the mail clerks from the statewide classification pay plan, § 39-18-312 (pay plan 60), MCA, to the blue collar plan, § 39-18-314, MCA.

2. The statewide classification pay rates are controlled by the legislature which may use an analysis of the labor market in a Department of Administration salary survey. The Department hired a local accounting firm, Anderson & Zurmuehlen (A & Z), to conduct the salary survey. The contract with A & Z included a requirement that all raw data, including employer names, be included in an electronic data base and delivered to the Department. A & Z advised all employers surveyed when soliciting their survey response that their identities would be "kept strictly confidential." A & Z compiled the salary survey report and delivered it to the Defendant. A & Z maintained the confidentiality of employers surveyed.

3. The names of the employers surveyed were provided to A & Z from the State Unemployment Insurance Contribution records. The employers surveyed received a letter from the Governor before and after survey participation informing the employers that the information provided, including their identification, would remain confidential (Exhibit 8, 9 and 10).

4. During negotiations, the Union asserted the classification pay plan did not reflect the type and quality of work performed by the Union members. The Defendant contended that the salary survey supported the classification pay plan. On July 2, 1997 the Union asked orally for a list of the public and private employers who participated in the salary survey. On July 20, 1997, the Department told the Union it did not have that information but would check with A & Z. On about August 2, 1997, the Defendant advised the Union it did not have and could not get the employer information requested. The Union representative responded by saying, "I understand but don't agree." (MacKay deposition page 15, lines 6 - 7). The Defendant informed the Union that it felt the information was proprietary (MacKay deposition, page 11, lines 16 - 19). On October 14, 1997, the Union asked for the names of the employers in a letter to the State. The State responded on November 5, 1997, indicating that A & Z had assured employers their survey participation identity would be held in confidence. Thereafter, during continuing investigation into this matter, the Union discovered the Defendant contract with A & Z which required A & Z to provide the employer names. The Union was not aware of the terms of the A & Z contract prior to filing the ULP charge. The Union did not at any time believe the Defendant actually had the information requested or had not made an effort to obtain the employer names from A & Z. The Union considered the identities of the employers surveyed information critical to negotiations. The Union wanted to know if such employers as UPS, Federal Express, and United Postal Service were included in the salary survey.

5. The Union representative believed that the Defendant was at all times truthful when indicating it did not have the employer name information requested. The transfer of mail clerks to the blue collar plan was the Union's continuing effort during several years of bargaining negotiations. The Union considered the type and nature of the mail clerks' duties supported the change to the blue collar plan. The Union indicated in negotiations that the mail clerks should be paid what UPS, Federal Express, and Post Office workers are paid.

6. The Defendant provided in negotiations the basis of its determination that the type and nature of work performed by the unit members was properly classified. This information was presented to the Union during negotiations. The Defendant relied upon the benchmark classification system and the corresponding pay assignment to the grade assigned to a classified position. The Defendant advised the Union that unit members could receive an increase in pay if they could show they were improperly classified. The Department advised the Union that if the type and nature of work performed by the unit members was not properly addressed by their classification designation, the unit members could file a classification appeal. The Department advised the Union that a change to the blue collar plan was not the proper method to address or remedy a type or nature of work issue.

7. A decertification petition was filed January 9, 1998 because negotiations were unsuccessful or stalled. An election was held on February 7, 1998 and the Union lost by one vote. During the election, the Defendant's observer began keeping a list of persons who had voted. When this action was observed by

the election judge, the record keeping stopped and the list thrown in the garbage can. The Union observer at the election did not see any person noticing the Defendant observer's record keeping and did not believe it influenced the election.

8. The decertification petition was filed requesting the election results should be set aside not because of the voter record keeping but because required "laboratory conditions" for the conduct of an election was destroyed as a result of the Department's failure to provide the employers' names. This failure allegedly seriously diluted the Union's effectiveness in negotiating and diminished a positive perception of the Union by the unit members. On or about December 30, 1997 a the Union member's bureau chief advised two Union member he was examining some paperwork regarding possible upgrade of mail bureau staff. He had also allegedly not allowed some upgrade training requests made by Union members.

The Union requests a bargaining order, a finding that the Defendants committed an unfair labor practice, an order requiring the Department to provide the Union with the employers' names, and an order requiring the Department to post a notice of the unfair labor practice charge finding decision that the delay in reaching an agreement was the result of the failure of the Department, not the Union.

III. DISCUSSION

Montana law requires filing of an unfair labor charge within six months of the violation. §39-31-404, MCA. When the Department advised the Union on July 22, 1997 that it did not have the employer names, the Union did not press the Department

for production of the information. The refusal to provide the information (the alleged ULP) did not occur until the Department responded to the October 14, 1997 letter on November 5, 1997 (Exhibits 1 and 2). The charge was filed in February 1998, within the six month filing period.

Section 39-51-603(3), MCA, prohibits release of employer names except to public employees. The State Research and Analysis staff testified that the release of the names of employers to the Union would violate § 39-51-603(3), MCA. The Union pointed out the inconsistency in the Department's reliance upon § 39-51-603(3), MCA. A & Z is not a "public employee" and yet were provided confidential information, employer names, from the Unemployment Insurance records which were used to conduct the survey.

The Union had an idea of the employer name and salary information requested independent of their request for that information from the Defendant. Without some knowledge of that rate, the Union would not have given the survey salary rate any question. The Defendant did not have that information but did make an effort to obtain it from A & Z. The fact that the contract with A & Z required the transfer of that information is irrelevant to the charge of refusal to bargain in good faith. The Defendant did not withhold any information. If the Union did not have the information, UPS, Federal Express, and U.S. Post Office salary rates, that information was available for them with a minimal effort of a phone call or two.

The Defendant in good faith addressed the type and nature of work issue raised by the Union. The Defendant's position and

advice to the Union was that to address pay or nature of work a classification appeal should be filed. That did not occur. The central issue and cause of frustration among the Union members was their pay, not the fact that the names of the persons surveyed were unavailable. A classification appeal, not an unfair labor practice charge, was the proper venue to remedy or address the type and nature of work problem. Section 2-18-203(2), MCA provides that the grade assigned to a class is not an appealable through a classification appeal. The grade assigned to a class is what determines pay and pay rates for state employees are set by the legislature.

By the time the Union asked for the names of the employers, the Department had presented the survey information to the Legislature which granted a one percent across the board increase to all State employees, both blue collar and plan 60. The Department lacks the authority to grant pay increases to mail clerks or any other persons except in very limited pay exception circumstances. [1]

The challenge to the election conduct and the result is without basis. The Union observer agreed the action by the Department observer in keeping track of those who voted was not observed by any unit members and did not affect the election results. The fact the names of the surveyed employers was not provided is insufficient to support the unfair labor practice charge. Insufficient information was offered regarding the independent examination of job descriptions or other employee

---

[1]To mitigate problems with difficult recruitment, retention, promotion, demotion, transfer, and other circumstances (MOM Policy 3-0505-1827 - Pay Plan Exceptions).

records by the mail clerk supervisors regarding pay upgrades or the alleged discrimination against unit members relating to upgrade training to block the election results.

The requirement of good faith bargaining is outlined in Volume 1, 3rd Edition, Patrick Harden, Developing Labor Law, page 608-610 (1992), as follows:

> The Board and the courts recognized at an early date that simply compelling the parties to meet was insufficient to promote the purposes of the Act.[2] Early attempts by employers to satisfy the bargaining obligation by merely going through the motions without actually seeking to adjust differences were condemned.[3] The concept of "good faith" was brought into the law of collective bargaining as a solution to the problem of bargaining without substance.[4] In 1947 Congress explicitly incorporated the "good faith" requirement into section 8(d).
>
> A. Totality of Conduct Assessed: *General Electric* and the Proper Roles of the Parties
>
> The duty to bargain in good faith is an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . ."[5] This implies both "an open mind and a sincere desire to reach an agreement"[6] as well as "a sincere effort . . . to reach a common ground."[7] The presence or absence of intent "must be

---

[2]NLRB, 1936 Annual Report 85.

[3]NLRB v. Montgomery Ward & Co., 133 F2d 676, 12 LRRM 508 (CA 9, 1943); Benson Produce Co., 71 NLRB 888, 19 LRRM 1060 (1946).

[4]Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1413 (1956).

[5]NLRB v. Montgomery Ward & Co., supra.

[6]See NLRB v. Truitt Mfg. Co., 351 US 149, 38 LRRM 2042 (1956).

[7]NLRB v. Montgomery Ward & Co., supra note 154, at 686. See NLRB v. Herman Sausage Co., 275 F2d 229, 45 LRRM 2829 (CA 5, 1960).

discerned from the record."[8] Except in cases where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright refusal to bargain,[9] relevant facts of a case must be studied to determine whether the employer or the union is bargaining in good or bad faith. The "totality of conduct" is the standard by which the "quality" of negotiations is tested.[10] Thus, even though some specific actions, viewed alone, might not support a charge of bad-faith bargaining, a party's overall course of conduct in negotiations may reveal a violation of the Act.[11]

Because the Board considers the entire course of conduct in bargaining, isolated misconduct will not be viewed as a failure to bargain in good faith. Thus, an employer's withdrawal of tentative agreements, standing alone, does not constitute bad faith in contravention of the bargaining obligation.[12] In *Roman Iron Works*,[13] for example, the employer violated section 8(a)(5) by its unilateral wage increase during negotiations. The employer also engaged in hard bargaining including a reduction of the wage offer during bargaining, denial of a union request for employee addresses, insistence on a right to subcontract, and a demand for significant cost reductions. However, the Board found that the union, made complete contract proposals, and made several significant concessions. Under all of these circumstances, the Board found that the employer did not engage in bad-faith bargaining.[14]

In reviewing the totality of the employer's conduct, the Board also takes into consideration an employer's antiunion behavior away from the

---

[8]General Elec. Co., 150 NLRB 192, 194, 57 LRRM 1491 (1964).

[9]Intent will not even be in issue if the outward conduct amounts to refusal to bargain. See NLRB v. Katz, 369 US 736, 50 LRRM 2177 (1962).

[10]B. F. Diamond Constr. Co., 163 NLRB 161, 64 LRRM 1333 (1967).

[11]See, e.g., NLRB v. Cable Vision, 660 F2d 1, 108 LRRM 2357 (CA 1, 1981).

[12]Williams, 279 NLRB 82, 121 LRRM 1313 (1986).

[13]275 NLRB 449, 119 LRRM 1144 (1985).

[14]Roman Iron Works, supra note 164.

> bargaining table.[15] However, the Board has held that such conduct away from the table does not establish bad faith where there exists no other evidence that the employer failed to bargain in good faith.[16]

The record in this case shows the Defendant bargained in good faith. The Union request for the names of employers surveyed in a very broad sense was germane to the bargaining terms. The Defendant did not have that information but did make a reasonable effort to obtain the employer names. When the Defendant discovered the promise of A & Z to maintain the confidentiality of the names, that information was given to the Union. At all times, the Defendant made a reasonable and truthful effort relating to information exchanged. Any requested information which the Defendant had was freely given to the Union.

The inconsistency between the contract with A & Z and what it provided the Defendant and the law prohibiting the Department of Labor from providing names to a non-governmental agency, as occurred when A & Z was provided unemployment insurance employer names, and the letters from the Governor assuring confidentiality are not central to this unfair labor practice charge. The judgment relative to good faith bargaining rests with the exchange of information which the Defendant had. The Defendant did not bargain in bad faith.

---

[15]NLRB v. Billion Motors, 700 F2d 454, 112 LRRM 2873 (CA 8, 1983).

[16]Allbritton Communications Co. v. NLRB, 766 F2d 812, 119 LRRM 3290 (CA 3, 1985).

IV. CONCLUSIONS OF LAW

1. The Board of Personnel appeals has jurisdiction over this matter under §§ 39-31-101 et seq, MCA and under implementation rules of ARM 24.26.601-685.

2. ULP 25-98 was filed within six months as required under § 39-31-404, MCA.

3. The Defendant bargained in good faith and did not violate §§ 39-31-401(5) and (1).

4. Decertification Election 2-98 was properly conducted and no reason found to block the election results.

V. RECOMMENDED ORDER

Unfair Labor Practice Charge 25-98 and Decertification 2-98 are without merit and HEREBY dismissed.

DATED this 8th day of December, 1998.

BOARD OF PERSONNEL APPEALS

By: Joseph V. Maronick
Joseph V. Maronick
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to ARM 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. § 39-31-406(6), MCA. Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 1728
Helena, MT 59624-1728